

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GRACO CHILDREN'S PRODUCTS, INC.,)
)
Plaintiff,)
)
-vs-) Case No. 1:13-CV-1183-TWT
)
KIDS II, INC.,) January 21, 2015
) Atlanta, Georgia
Defendant.) 10:03 a.m.
_____)

TRANSCRIPT OF THE MOTIONS HEARING
BEFORE THE HONORABLE THOMAS W. THRASH, JR.,
U.S. DISTRICT COURT JUDGE

APPEARANCES OF COUNSEL:

On behalf of the Plaintiff: Stephen Schaetzel
Trey Levie
MEUNIER, CARLIN & CURFMAN

On behalf of the Defendant: Scott Amy
THOMAS HORSTEMEYER

Also present: Karen Etheridge
Sean Beckstrom
Joseph Staley
Lorna Street

*Proceedings recorded by mechanical stenography
and computer-aided transcript produced by*

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1 (Proceedings held in Atlanta, Georgia, January 21,
2 2015, 10:03 a.m., in open court.)

3 THE COURT: All right. This is the case of Graco
4 Children's Products, Inc. versus Kids II, Inc., Case Number
5 13-CV-1183.

6 First let me ask counsel for the parties to identify
7 yourselves for the record and the parties you represent.

8 MR. SCHAE TZEL: Thank you, Your Honor. Good morning.
9 For the Plaintiff, Steve Schaetzel and Trey Levie to my left
10 with the firm of Meunier, Carlin & Curfman. To Trey's left is
11 Karen Etheridge who is chief intellectual property counsel at
12 Newell Rubbermaid, and to the table behind us is Sean Beckstrom
13 who is an attorney with Graco.

14 THE COURT: Good morning, Mr. Schaetzel.

15 MR. AMY: Good morning, Your Honor. Scott Amy with
16 Thomas Horstemeyer here on behalf of Kids II. To my right is
17 Joseph Staley, the vice president of legal for Kids II. And
18 behind me to my right is Lorna Street, the CFO of Kids II.

19 THE COURT: Good morning, Mr. Amy.

20 All right. This is a hearing on the
21 discovery-related motions that have been filed in this case.
22 First, with respect to the Defendant's motion to strike the
23 Plaintiff's motion to compel, I'm going to deny the motion. A
24 motion to strike is only authorized to be filed with respect to
25 a pleading, and a motion to compel is not a pleading. So the

1 motion to strike at Docket 55 is denied.

2 With respect to the motion to compel, Mr. Amy, let me
3 hear from you with respect to the response that the motion to
4 compel was untimely and it was filed without adequate
5 compliance with Rule 37's requirement that counsel meet and
6 confer with respect to any discovery dispute before filing a
7 motion to compel.

8 MR. AMY: Okay. Thank you, Your Honor.

9 With respect to our contention that the motion was
10 untimely, there are three -- well, I should back up.

11 There are three issues at this point in their motion.
12 The first is a motion to compel Kids II to further respond to
13 Interrogatories Number 9 and 10. The second issue is whether
14 the parties' agreement to produce e-mail in the case should
15 result in Kids II producing e-mail. And then the third issue
16 is the production of documents from non-parties Kids II Far
17 East and Thomas Far East.

18 Our motion to strike which you denied but the issue
19 of whether --

20 THE COURT: Wait a minute. Wait a minute.

21 MR. AMY: Pardon me.

22 THE COURT: I've got this backwards. It's Graco's
23 motion to compel, and it's your contention that the motion to
24 compel was filed untimely and without adequate meeting and
25 conferring.

1 MR. AMY: Yes.

2 THE COURT: Have I got it right now?

3 MR. AMY: Yes, Your Honor.

4 THE COURT: Okay. Then I want to hear from
5 Mr. Schaetzel first.

6 MR. AMY: Okay.

7 THE COURT: Sorry about that. I had it totally
8 backwards.

9 MR. SCHAETZEL: Thank you, Your Honor.

10 First, as to whether or not the motion is untimely,
11 we submit that it is not untimely because discovery in this
12 case has not expired. As the Court is aware, there is a unique
13 procedure in patent cases where you have the standard track of
14 discovery of eight months; and if at the conclusion of that
15 eight-month period a Markman order has not yet been entered,
16 once that order is entered there is an additional 45-day
17 period. And that's discussed at length in the briefs.

18 The motion is not untimely because we have not
19 completed discovery in that that 45-day period has not yet even
20 begun. So for that reason, the motion is not untimely. And we
21 would submit that if, in fact, it's their position that the
22 motion is untimely because the expiration of the first
23 discovery period dictates then there are several things that
24 were to have been done that were not done by Kids II.

25 For example, 30 days prior to the close of discovery

1 if they have any opinion of counsel that they are going to rely
2 on they have to produce it. They have not produced that. So
3 both parties have acted in accordance with the notion that
4 there is yet discovery to come and that it's -- as a result of
5 that our motion is not untimely.

6 As to the duty to meet and confer, we did fulfill
7 that duty, Your Honor; and we did it in two ways. First of
8 all, we did it by asking to meet and confer with them during
9 the original time period. There was a flurry of activity, if
10 you will, in the last month of discovery. There were many
11 depositions being scheduled. And some were taken; some were
12 not. Two of the depositions that were not taken were
13 depositions of Kids II witnesses that Kids II unilaterally
14 decided those depositions could be moved to the 45-day period
15 that was yet to come.

16 In view of that outstanding discovery and in view of
17 what we had learned in those depositions that we had taken as
18 set forth in our motion to compel, things that we thought were
19 not produced, on the next-to-last day of discovery we did send
20 a letter and say we need to talk about these things. That
21 effort to meet and confer fulfilled our obligation under the
22 rule.

23 When we spoke with Mr. Amy, he said, I'm getting
24 ready for another case, I don't have the opportunity to talk
25 now. We said, That's fine, we understand that. And we filed a

1 motion to extend discovery. And the basis for that motion was
2 additional discovery that we knew had to be done -- for
3 example, these two depositions -- and it would give the parties
4 a chance to address the issues that we had seen at the close of
5 discovery.

6 We subsequently did meet and confer, although Kids II
7 was not available to do so for another month. We did meet and
8 confer on September the 4th, and as a result of that
9 meet-and-confer and some other work several issues in the
10 motion to compel were resolved leaving the three issues that
11 Mr. Amy mentioned. But we did meet and confer. We did so on
12 the 4th of September. So our position is that we fulfilled our
13 obligation in those two ways.

14 THE COURT: Mr. Amy?

15 MR. AMY: Sure.

16 First, Your Honor, with respect to our contention
17 that the motion to compel was untimely, discovery expired on
18 July 31st, 2014. Now, Mr. Schaetzel is correct that the way
19 the local patent rules in this district are set up that there
20 is a unique situation where the parties typically have
21 somewhere between eight or more months of fact discovery. But
22 then fact discovery closes assuming the Court hasn't issued a
23 claim construction order, and then it will reopen subsequent to
24 the Court's claim construction order.

25 But under their position, if discovery did not close

1 then essentially a party would be permitted to continue to file
2 discovery motions in this dead period as I'll call it between
3 when the initial fact discovery period closes and the 45-day
4 period for discovery filing claim construction reopens. And
5 that is not -- my reading of the local rules is that the intent
6 is that discovery will close, that there won't be additional
7 discovery taken during this dead period, there won't be a
8 flurry of motions as we have seen in this case during the dead
9 period.

10 And so Local Rule 37.1 is pretty clear that if you
11 are going to file a motion to compel you need to file that
12 motion before the close of discovery, and even the rule states
13 that that close of discovery is either established by the
14 expiration of the original period or the extended period. Here
15 two of the three issues in their motion to compel, the issue
16 over the production of e-mail and the issue over the production
17 of documents from non-parties in this case that they contend
18 are related to Kids II, are based on discovery that was served
19 on us in the fall of 2013. We responded to that discovery with
20 written responses and objections in November of 2013. We
21 produced our documents in February of 2014.

22 They waited until 18 days after the close of the
23 original fact discovery period to file their motion to compel.
24 Thus, it's our contention that under the local rules,
25 specifically 37.1, that it's untimely. If they wanted to file

1 a motion on those issues, they should have filed it much
2 earlier in the case and definitely before the close of the
3 original fact discovery period.

4 With respect to our contention that they did not meet
5 and confer, their request to meet and confer came on the
6 morning of the last day of the original discovery period. I
7 got a letter on the night before, and then they called me the
8 morning of and wanted to meet and confer about a seven-page
9 discovery letter that they had just decided needed to be
10 addressed on the last day of the discovery period.

11 So, once again, if these issues had been brought to
12 our attention earlier, we probably could have resolved them.
13 The motion probably could have been timely. But they waited
14 until the last day, and then they waited until after the close
15 of the initial period to file the motion.

16 In terms of the timing of the meet-and-confer,
17 Mr. Schaetzel is correct. I was fully engaged in another case
18 at that point. In fact, that was the Wonderland case that was
19 previously before this Court that was recently transferred to
20 Judge Ross. We had expert discovery in that case. They wanted
21 to essentially meet and confer with hours' notice which I
22 couldn't do. Then the parties tried to meet and confer over
23 the next several weeks.

24 Their motion was ultimately filed on August 18th.
25 But prior to filing a motion, we never got on the phone. We

1 never had a meet-and-confer pursuant to the local rules. In
2 fact, we informed them that it was our position that the
3 parties hadn't met and conferred on the 18th of August. And in
4 response, they proposed that the parties meet and confer later
5 that week. At the same time, then they filed their motion that
6 same day. If we had met and conferred, why would there be a
7 need for us to meet and confer later that week, Your Honor?

8 So it's our position that the motion was both
9 untimely under our interpretation of the local rules and the
10 parties haven't adequately met and conferred.

11 Thank you.

12 THE COURT: Mr. Schaetzel, it's your motion. I will
13 give you the last word if you want to say anything else.

14 MR. SCHAETZEL: Two last points, Your Honor.

15 First, no good deed goes unpunished. We tried to
16 accommodate Kids II as they were involved in the other matter.
17 When they told us later in the month that they were going to
18 argue that our motion was going to be untimely, we filed
19 promptly so that that would foreclose that argument or at least
20 prevent it from going any further. But the only reason we
21 didn't file on the 31st was because we were trying to be
22 accommodating.

23 Second of all, it would be unusual to find -- as Kids
24 II admits, once the Court enters a Markman order and discovery
25 reopens we could file a motion to compel. It is admitted on

1 that day. It would be unusual to find that our motion is late
2 or untimely when it is still able to be filed at a time in the
3 future. The fact that we could still file would seem to
4 preclude an argument that it was untimely at least in terms of
5 being late.

6 Thank you, Your Honor.

7 THE COURT: Well, this apparently poses an issue that
8 hasn't been addressed I assume from both of your presentations
9 to your knowledge by any of the judges of this district, this
10 question of when discovery ends as far as filing a motion to
11 compel is concerned under the local patent rules. So I'll
12 decide that issue as I think it's best decided.

13 The intent in my opinion of the local rule requiring
14 that a motion to compel be filed no later than the close of
15 discovery is so that the Court can address any outstanding
16 discovery issues in a timely manner and before other crucial
17 deadlines occur such as the deadline for filing a motion for
18 summary judgment or in a patent case the time for issuing a
19 claims construction order. I think the purpose of that would
20 be defeated if a party could file a motion to compel relating
21 to discovery responses that were served during the initial
22 discovery period if they could file such a motion anytime
23 afterwards, including any reopened discovery following upon the
24 Court's claims construction period.

25 So my position is going to be that any motion to

1 compel relating to discovery that was served or objections to
2 unserved discovery or objections to inadequate responses to
3 discovery has to be filed no later than the day of the initial
4 and any extended discovery period, and that was not done in
5 this case. Therefore, the motion to compel is untimely.

6 In addition, it's my judgment that the motion should
7 be denied because there was inadequate good-faith effort to
8 meet and confer regarding the discovery disputes. I've held
9 many times and I again say that the meet-and-confer obligation
10 is not satisfied by one party simply sending a letter to the
11 other side saying your discovery is inadequate and you need to
12 do X, Y, Z to cure the inadequacies of that discovery. That is
13 not the process that was intended by the Court or the rules
14 committee in adopting the meet-and-confer requirement,
15 particularly when that is done on the last day of discovery as
16 happened here.

17 The meet-and-confer requirement requires a genuine,
18 good-faith, face-to-face or at least telephone-to-telephone
19 conversation among counsel in an effort to avoid these kinds of
20 lengthy, time-consuming, expensive discovery disputes. And
21 it's simply not adequate to shoot off a letter or an e-mail as
22 I see so often on the last day of discovery and then say, well,
23 we've satisfied our obligation to meet and confer. So for
24 those reasons, I'm going to deny the motion to compel.

25 And, Mr. Amy, if you will prepare a written order

1 denying the motion on those grounds, get Mr. Schaetzel's
2 approval as to form and submit it to me, I'll sign it.

3 MR. AMY: Thank you, Your Honor.

4 THE COURT: All right. In light of my ruling,
5 Mr. Schaetzel, are you still seeking an extension of time for
6 discovery?

7 MR. SCHAETZEL: Yes, Your Honor.

8 THE COURT: Why?

9 MR. SCHAETZEL: Because there are outstanding
10 discovery to be done. For example, consistent -- I'm sorry.
11 Consistent with the Court's rulings, in order for us to conduct
12 the second discovery period we have noticed the deposition of a
13 Mr. Poma and a Ms. Neblett. Mr. Poma used to work for Kids II,
14 although he no longer does. But he is being represented by
15 Mr. Staley for purposes of this matter. Ms. Neblett still does
16 work for Kids II. Those are the depositions that were
17 unilaterally suspended in that last month of discovery by Kids
18 II, and we need to get those depositions done before we move
19 into the next discovery-phase period.

20 And while I appreciate the Court's order and will
21 certainly respect the Court 's order regarding the denial of
22 the motion to compel, that was part of the reason for
23 requesting an extension in the first place. As set forth in
24 that motion, we were concerned about those depositions and we
25 were concerned about the opportunity to conduct a

1 meet-and-confer in accordance with Mr. Amy's schedule as set
2 forth in the motion. So that was a consideration of the
3 procedure that we employed to try and resolve the discovery
4 disputes without filing a motion to compel. So for both of
5 those reasons, we would seek the motion to extend.

6 THE COURT: What are the names of the two deponents?

7 MR. SCHAETZEL: Marco Poma.

8 THE COURT: Marco?

9 MR. SCHAETZEL: Poma, P-o-m-a.

10 And is it Karen?

11 MR. STALEY: Karen.

12 MR. SCHAETZEL: Karen. I think it's K -- I don't
13 recall how to spell Karen, Your Honor.

14 MR. AMY: Karen with an A, K-a-r-e-n.

15 MR. SCHAETZEL: K-a-r-e-n. Neblett, N-e-b-l-e-t-t.
16 I think I spelled it correctly.

17 MR. AMY: Correct.

18 THE COURT: What do you say, Mr. Amy?

19 MR. AMY: Your Honor, we found ourselves in the same
20 position with their motion for an extension of time. The
21 extension -- the request for the extension once again came on
22 the very last day of the discovery period. It didn't come a
23 week in advance. It didn't come even two weeks in advance. It
24 came on the very last day of discovery. And as I have already
25 mentioned, at the time the request was made we were fully

1 engaged in another matter, the Wonderland matter.

2 And so what we did in an effort to address their
3 concern with having additional time to conduct the discovery
4 they needed, including these two depositions, but also
5 balancing our schedule before this Court on another matter was
6 to essentially propose that we wouldn't give them 30 days to
7 take those two depositions during the month of August 2014, but
8 what we would do is we'd consent to a 30-day extension to the
9 45-day period following claim construction. So really in our
10 view this dispute's more not so much about the relief but the
11 timing of the relief, when they are going to take the discovery
12 that they have requested.

13 As for Ms. Neblett, or as to I should say the
14 contention that these depositions were unilaterally suspended,
15 they were noticed; but if my memory serves me correct, dates
16 were never confirmed for the depositions. We couldn't make the
17 dates work within the discovery period. Ms. Neblett will
18 likely be a 30(b)(6) witness on behalf of Kids II. It's a lot
19 more efficient if you conduct an individual deposition and a
20 30(b)(6) deposition back to back either on the same day or on
21 two days. The parties have already agreed that 30(b)(6)
22 depositions will be pushed to the 45-day period following the
23 Court's claim construction. That was an agreement we made when
24 discovery kicked off in June of last year.

25 As for Mr. Poma, Mr. Poma's a non-party to this case.

1 He was an employee of Kids II, but he is no longer an employee.
2 My understanding from Mr. Staley is he does not consent to
3 having his deposition taken outside the normal discovery
4 period.

5 But as I mentioned earlier, it's really about the
6 timing of the relief rather than the relief itself. It doesn't
7 really make sense for discovery to open for 30 days just to
8 take these two depositions. We are going to ramp up, we are
9 going to take two depositions and then to have discovery close
10 just to have it reopened after the Court's claim construction.
11 We have already got discovery forthcoming under the Court's
12 local rules under the local patent rules. It would be a lot
13 more efficient to take these two depositions during that
14 period. And if they need additional time, our offer still
15 stands. We will consent to a 30-day extension.

16 Thank you, Your Honor.

17 THE COURT: Mr. Schaetzel, it's your motion. If you
18 want to say anything else, I will hear from you.

19 MR. SCHAETZEL: Your Honor, in Document Number 66-1
20 which is our reply to the motion to extend the discovery
21 period, we attached an e-mail from Mr. Amy to me where he says
22 -- first of all, there were three depositions that were to be
23 taken at the end of that period. One of them was a Mr. Jackson
24 who is an officer of Kids II, Mr. Poma and Ms. Neblett. He
25 indicates that due to an unexpected conflict Mr. Jackson is not

1 available for his deposition on Thursday, July 24th. He next
2 indicates that Ms. Neblett is unavailable for her deposition on
3 July 31 and in the next paragraph that Mr. Poma is unavailable
4 for his deposition on July 29.

5 We did have dates set for those last two depositions.
6 As an accommodation to Mr. Jackson, we did take his deposition
7 outside of the discovery period in view of his schedule. So we
8 would first submit that there were dates scheduled for these
9 people. They were noticed within the time period. But due to
10 counsel's schedule and due to the witness's schedule, they just
11 wanted to move those depositions to the last 45 days. We would
12 like to get those done.

13 Second of all, I'd like to be certain that we are on
14 the same page in terms of the motion to compel. And I
15 apologize for going back to that, but I need this
16 clarification. There were two sets of discovery requests as
17 Mr. Amy just said. The answers due for the second set of
18 discovery requests which relates to damages, those answers were
19 due on the 31st of July at the very close of the discovery
20 period. To the extent that those were not responded to, we
21 would submit that the August 18 motion was properly served
22 within the time period that under the local rules provides for
23 an extension beyond the close of discovery in such
24 circumstances where the responses or the answers are due at the
25 very termination of the period.

1 I understand the Court's ruling and certainly will
2 respect it as to the other two issues which are the e-mail and
3 the production of documents from the related Asian entities.
4 There were, however, documents that were due or responses that
5 were due at the very close of discovery; and they would seem to
6 fall outside of the ruling that the Court has already made
7 related to the motion to compel. And so I would ask for that
8 clarification to be certain that I understand the Court's order
9 as it pertains to those documents.

10 In terms of these two depositions, we would conclude
11 just simply by saying it would -- to our side of the case, Your
12 Honor, the more that can be done now the better rather than
13 trying to cram discovery that was admittedly properly served
14 and sought in the first discovery period into the second
15 discovery period. So we would submit that getting those done
16 sooner rather than later is to everyone's benefit.

17 THE COURT: Well, as far as the motion to compel is
18 concerned, Mr. Schaetzel, the motion to compel is denied as to
19 all discovery subject to the motion to compel.

20 With respect to the motion to extend fact discovery,
21 that is granted in part and denied in part. I'll grant it to
22 the extent that I will extend the time for discovery for an
23 additional 30 days to allow the Plaintiff to schedule and take
24 the depositions of Marco Poma and Karen Neblett, and I'll
25 direct counsel to confer and cooperate in good faith in a

1 reasonable and diligent effort to schedule the depositions
2 within that 30-day period and if you cannot to confer in good
3 faith in an effort to present a consent order that will
4 accommodate whatever time frame is needed to get the
5 depositions taken within a reasonable period of time.
6 Otherwise, I deny the motion to extend discovery.

7 MR. STALEY: Your Honor, could I add one thing?

8 As representing Marco Poma, he is a non-party to the
9 case and he hasn't been subpoenaed in the matter for his
10 deposition at this time.

11 THE COURT: Is that really necessary?

12 MR. STALEY: I don't know if he -- actually, I don't
13 know that he is actually in state anymore. He is looking for
14 another job, and I think he is traveling actually. I can
15 certainly do my best to try to get in touch with him, though.

16 THE COURT: Well, do the best you can. If he is not
17 willing to come voluntarily, you will have to subpoena him,
18 Mr. Schaetzel.

19 MR. SCHAETZEL: Understood.

20 MR. STALEY: Thank you, Your Honor.

21 THE COURT: Seems to me that a whole lot of effort
22 and expense is being extended in this case that could be
23 avoided if counsel would simply work together and try to
24 resolve problems instead of magnifying them.

25 All right. Next is the Plaintiff's motion to file

1 under seal exhibits to its memorandum in support of its motion
2 to compel which is Docket Number 54.

3 The law in the 11th Circuit is very clear that court
4 records are presumptively public and that good cause must be
5 shown to file documents under seal and that showing be made
6 that the documents contain genuine trade secrets, confidential
7 personal information and that conclusionary statements as to
8 confidentiality are not adequate to support an order sealing
9 documents. I don't think adequate showing has been made with
10 respect to the exhibits identified in the motion, so I deny the
11 motion to seal.

12 Next is the Plaintiff's motion to file under seal
13 exhibits to its reply brief which is our Docket Number 69.
14 That motion is denied for the same reason.

15 Next is the Defendant's motion for leave to file a
16 surreply which is Docket Number 74 in response to the
17 Plaintiff's motion to compel. That motion is denied as moot.

18 Next is the Plaintiff's motion to file under seal its
19 reply brief in Exhibit A to the reply brief, Docket Number 77.
20 That motion is denied for the reasons previously stated.

21 Next is the Plaintiff's motion to file under seal its
22 response to the Defendant's motion for leave to file a
23 surreply, Docket Number 80. That motion is denied for the
24 reasons previously stated.

25 Next is the Plaintiff's motion to strike the

1 Defendant's second supplemental response to the Plaintiff's
2 second supplemental disclosure of preliminary infringement
3 contentions. That is not a pleading; therefore, it is not
4 subject to a motion to strike. So the motion at Docket Number
5 85 is denied.

6 Next is the Defendant Kids II's -- well, that's not
7 next. I think that's everything.

8 Okay. I thought I denied the motion for leave to
9 file surreply at Docket Number 68. If I didn't, I deny that as
10 being moot.

11 And there's a motion for leave to file under seal the
12 surreply at Docket Number 75 by Kids II. That is denied for
13 the reasons stated for denying the Plaintiff's motion for leave
14 to file under seal.

15 I think that's everything.

16 Thank you very much, gentlemen. That concludes the
17 hearing. Court's in recess until further order.

18 (Proceedings adjourned at 10:36 a.m.)
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C E R T I F I C A T E

UNITED STATES DISTRICT COURT:

NORTHERN DISTRICT OF GEORGIA:

I hereby certify that the foregoing pages, 1 through 20, are a true and correct copy of the proceedings in the case aforesaid.

This the 28th day of January, 2015.

Susan C. Baker, RMR, CRR
Official Court Reporter
United States District Court